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DIRECTOR OFFICE
TECHNOLOGY CENTER 2600

In re Application of
Frank Olschewski, et al.
Application No. 09/683,795
Filed: February 15, 2002
For: **METHOD AND ARRANGEMENT FOR
IMAGING AND MEASURING MICROSCOPIC
THREE-DIMENSIONAL STRUCTURES**

DECISION ON PETITION

This is a decision on the request to withdraw final action filed June 30, 2004, which is treated as a Petition to Withdraw the Holding of Abandonment pursuant to 37 C.F.R. § 1.181(a). No fee is required.

This application became abandoned for failure to file a proper and timely reply to a final Office action mailed on December 31, 2003. The current request was filed on June 30, 2004. No further response was entered into the record within the period mentioned above, including any request for extension of time. Thus, the application was considered abandoned as of April 1, 2004.

Petitioner alleges that in response to an interview with the examiner, to have filed an amendment December 17, 2003 which the examiner indicated would have placed the application in condition for allowance. In support, petitioner has provided as evidence, a copy of the amendment, inclusive of a certificate of facsimile transmission and also a sending unit's report confirming transmission of a seven page amendment/reply on December 17, 2003.

The application record does not reveal an interview summary or an amendment filed on December 17, 2003.

37 C.F.R. § 1.8(b) states that in the event that correspondence is considered timely filed by being mailed or transmitted in accordance with paragraph (a) of this section, but not received in the Patent and Trademark Office, and the application is held to be abandoned or the proceeding dismissed, terminated, or decided with prejudice, the correspondence will be considered timely if the party who forwarded such correspondence:

- (1) Informs the Office of the previous mailing or transmission of the correspondence promptly after becoming aware that the Office has no evidence of receipt of the correspondence;
- (2) Supplies an additional copy of the previously mailed or transmitted correspondence and certificate; and
- (3) Includes a statement which attests on a personal knowledge basis or to the satisfaction of the Commissioner to the previous timely mailing or transmission. If the correspondence was sent by facsimile transmission, a copy of the sending unit's report confirming transmission may be used to support this statement. [emphasis added]

The sending unit's report confirms successful facsimile transmission on December 17, 2003, but does not reflect that Applicant's representative used the Office's official facsimile number for submission of the amendment/reply. It has been determined however, that the facsimile number

used by applicants is a facsimile number associated with the U.S. Patent and Trademark Office. Thus, the amendment/reply was filed prior to the mailing of the final Office action, and thus there was a crossing in the mail.

MPEP §714.05 Examiner Should Immediately Inspect, states in part:...

ACTION CROSSES AMENDMENT

A supplemental action is usually necessary when an amendment is filed on or before the mailing date of the regular action but reaches the Technology Center later. The supplemental action should be promptly prepared. It need not reiterate all portions of the previous action that are still applicable but it should specify which portions are to be disregarded, pointing out that the period for reply runs from the mailing of the supplemental action. The action should be headed "Responsive to amendment of (date) and supplemental to the action mailed (date)."

MPEP §714.15 Amendment Received in Technology Center After Mailing of Notice of Allowance, states in part:...


If, however, the amendment is filed in the Office prior to the mailing out of the notice of allowance, but is received by the examiner after the mailing of the notice of allowance, it has the same standing in the application as though the notice had not been mailed. Where the application has not been closed to further prosecution, as by final rejection of one or more claims, or by an action allowing all of the claims, applicant may be entitled to have such amendment entered even though it may be necessary to withdraw the application from issue. Such withdrawal, however, is unnecessary if the amendatory matter is such as the examiner would recommend for entry under 37 CFR 1.312.

Accordingly, the holding of abandonment is withdrawn and the final Office action of December 31, 2003 is hereby vacated.

The petition is **GRANTED**.

The application file is being forwarded to the technical support staff for entry of the amendment which accompanied the subject request/petition. Thereafter, the application will be forwarded to the examiner for appropriate action in due course.

Petitioner is reminded that the Official Facsimile Number for all incoming correspondence to the Office is (703) 872-9306. Petitioner may want to note this number in order to avoid any future correspondence problems.


Dwayne D. Bost

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Technology Center 2600
Communications